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Supreme Court, U.S.
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NO. A-55

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

AARON VENCE & DENISE YOUNG
PETITIONERS

VS.

BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC.,
THE BOARD OF DIRECTORS OF BOLIVAR COUNTY
COMMUNITY ACTION PROGRAM, INC., being
CLYDE AYCOCK, JERRY HOLLINGSWORTH,
WESLEY J. LIDDELL, SAM D. LONG, E. L. McMURCHY, JR.,
THOMAS MORRIS, WILLARD SAMUELS, JIM SCOTT,
KIRKHAM POVALL, TOMMY NARON, ALLEN DENNIS,
JOE ANDERSON, WILLIE B. SMITH, also RICHARD GERNERT,
JO ANN ANDERSON, BILLY JOE McCAIN, JOHN L. JORDAN,
and OTIS R. BOWEN, SECRETARY OF THE DEPARTMENT
OF HEALTH & HUMAN SERVICES
RESPONDENTS

PETITION FOR CERTIORARI: from the COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI - 5th AMENDMENT,
42 USC SECTION 1983 and MANDAMUS CLAIMS

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QUESTIONS PRESENTED

I.

Whether it was error to grant Defendants' Motions for Summary Judgement and to Dismiss the Fifth Amendment claim when a reasonable juror could have found the responsible HHS official provided significant, covert encouragement to the Bolivar CAP Director to fire Mr. Vence over the disapproval of the Policy Council.

II.

Whether it was error to grant Defendant's Motions for Summary Judgement and to Dismiss when the responsible HHS official owed Mr. Vence and Miss Young the duties of: not advising Bolivar CAP to violate the regulations, enforcing the original Policy Council decision reinstating Mr. Vence and holding the Show Cause

Hearing in compliance with the regulations.

III.

Whether it was error for the District Court to never rule on Petitioner's FRCP 56(f) Opposition to the Non-Federal Defendants' Motion for Summary Judgement when continuing discovery problems existed.

IV.

Whether 28 USC s 1920 (2) requires that a defeated plaintiff always is required to pay the costs of his deposition even when it is not used in any substantial sense by either the Court or the prevailing party.

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Bolivar Headstart Standard Operating Procedure #18
Roberts Rules of Order

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

Aaron Vence and Denise Young

Petitioners

v.

Bolivar County Community Action Program, Inc., The Board of Directors of Bolivar County Community Action Program, Inc., being Clyde Aycock, Jerry Hollingsworth, Wesley J. Liddell, Sam D. Long, E.L. McMurchy, Jr., Thomas Morris, Willard Samuels, Jim Scott, Kirkham Povall, Tommy Naron, Allen Dennis, Joe Anderson, Willie Anderson, Billy Joe McCain, John L. Jordan and Otis R. Bowen, Secretary of the Department of Health and Human Services

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Aaron Vence and Denise Young, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 20, 1987.

Opinions Below

The opinion of the HHS Hearing Officer is unreported and is printed in Appendix "A" hereto, page . The opinion of the United States District Court for the Northern District of Mississippi Delta Division is unreported and is printed in Appendix "A" hereto, page . The Order of the United States District Court for the Northern District of Mississippi Delta

Division, dismissing Petitioners' Complaint is unreported and is printed in Appendix "A" hereto, page . The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court is unreported and is printed in Appendix "A" hereto, page .

Jurisdictional Grounds in This Court

The Judgement for the United States Court of Appeals for the Fifth Circuit (Appendix "A", page) was entered on April 20, 1987. The jurisdiction of the Court is invoked under 28 USC §§ 1254 (1).

Constitutional and Statutory Provisions

The Constitutional Provisions at issue here is the Fifth Amendment

to the Constitution of the United States. The statutory provisions are 42 USC § 1983, 5 USC § 702, 28 USC § 1361, 42 USC § 9837, 42 USC § 9833, 28 USC § 1920 (2). Since they are too lengthy to be set out here, they are printed in Appendix "A" at pps.

Statement of the Case

This is an action by Petitioner Aaron Vence, who served as the administrative assistant at Bolivar County, Mississippi Head Start for eighteen (18) years against Respondents Billy Joe McCain, the program director, the Board of Directors of Bolivar County Community Action Program (hereinafter Bolivar CAP) which was designated to administer Bolivar

Headstart by the Bolivar County Board of Supervisors and the Department of Health and Human Services, Richard Gernert, the Executive Director of Bolivar CAP, and Jo Ann Anderson, chairman of the Headstart Policy Council, a parents' group required by the statute and regulations, for injunctive relief and damages to redress his termination from his position by the foregoing defendants in violation of the Fifth Amendment to the United States Constitution and 42 USC §§ 1983. This is also an action by Aaron Vence against Respondents Dr. Otis R. Bowen, Secretary of the Department of Health and Human Services (hereinafter HHS) and John L. Jordan, the HHS employee

charged with overseeing Bolivar Headstart, for injunctive relief ordering them to enforce the original Policy Council Decision reinstating him under the Fifth Amendment and for a Writ of Mandamus also ordering them to enforce the original Policy Council Decision reinstating him pursuant to 5 USC § 702. Finally it is an action by Petitioner Denise Young who was a duly elected Policy Council Member when the complained of events happened, against Respondents Dr. Bowen and Mr. Jordan for a Writ of Mandamus to vindicate her vote to reinstate Mr. Vence pursuant to 5 USC § 702 (Rpps. 1-18). Miss Young was originally joined by two (2) other Policy Council members, Reverend Charles Williams and Beverly

Perkins who have since withdrawn grom the case (Rpp. 347-349, Principal Brief p.26).

Aaron Vence had served well for eighteen (18) years as the administrative assistant to Billy Joe McCain, Director of Bolivar County Headstart (Rpp. 2, 269, 369). However, in March of 1983, Mr. Vence was very outspoken at a meeting of Headstart workers where the topic was Mr. McCain's alleged misuse of program funds (Rpp 5, 269,371). Within three (3) months, on June 17, 1983, Mr. Vence was accused by Mr. McCain of filing local travel statements when he had not actually performed the travel (Rpp. 5, 269, 372). The basis of this

accusation was Mr. Vence having inadvertently misdated a travel statement for a day when he was in Dallas, Texas. However, he had made the travel, just not on the date in question (Rpp. 269-270). Mr. McCain was never able to produce any other conclusive proof of this allegation.

Then on July 8, 1983, Mr. McCain sent Mr. Vence another letter accusing him of receiving duplicate travel payments from the National Headstart Staff Association while Mr. Vence was a Board member of said association and not notifying the Headstart Program (Rpp. 5, 270,372). Mr. Vence had earlier told Mr. McCain he was receiving these payments which, anyway, did not duplicate the

travel payments Mr. Vence had received from Bolivar Headstart (Rpp. 5,270,372, 336-337). The National Headstart Staff Association was very disorganized in reimbursiing Board members and only did so at sporadic intervals. Often, Mr. Vence would receive reimbursement at subsequent meeting for his travel to a previous meeting. Other times the NHSSA Board Meeting would occur in the same location immediately before the NHSSA Convention. When that happened, Mr. Vence would receive some funds from NHSSA to attend the Board Meeting and the other funds from Bolivar Headstart to attend the Convention (Rpp. 147-270). Mr. McCain never did establish this

action that Mr. Vence knowingly received duplicate travel payments from NHSSA and Bolivar Headstart to attend the same meeting.

On September 29, 1983, Mr. McCain sent Mr. Vence a letter suspending Mr. Vence without pay pending termination for "deliberate falsification of records and misappropriation of program funds" (Rpp 5-6, 147, 270, 273). Pursuant to the HHS regulations governing Headstart programs and Bolivar Headstart's own Standard Operating Procedures, Mr. Vence appealed his suspension to the Headstart Policy Council (Rpp. 6, 147, 270, 273). The Policy Council is a parents' group which

exists to fulfill the statutory mandate of 42 USC § 9837(b): "In order to be so designated, a Headstart agency must also (1) establish effective procedures by which parents and area residents concerned will be enabled to directly participate in decisions that influence the character of programs affecting their interests; (2) provide for their regular participation in the implementation of such programs..." and 42 USC § 9833 which requires that, in order to be provided financial assistance by HHS, a Headstart Agency must "... provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local

level." The HHS regulations setting out the structure and functions of Policy Councils are found at 45 CFR Appendix "B", Chart C. Under the regulations, Policy Councils must approve or disapprove the firing of Headstart Staff. The Headstart Staff and the CAP Executive Director had general responsibility. The CAP Board "may be consulted". Under the regulations this means that the CAP Board <u>may</u> be called upon for information, advice, or recommendations by those individuals having general or operating responsibility. The Regulations state that where a group that must approve the firing does not approve it, the step cannot be taken until

agreement is reached between the disagreeing groups or individuals. In this case that should mean agreement between the Policy Council, Mr. McCain and Mr. Gernert, not between the Policy Council and CAP Board - which only "may be consulted" and has no decision making power to this instance.

Further, Paragraph C Functions found at p. 660 of 45 CFR states; re: Policy Councils: "The following paragraphs and charts describe the minimum functions and decrees of responsibility for various policy groups involved in administration of locat Headstart Programs. Local groups may negotiate for additional functions and a greater share of responsibility if all parties agree...

(emphasis in original).

In this case, Bolivar Headstart had adopted the following Standard Operating Procedure #18, which under the Regulations had to have been approved by the Executive Director, which was also approved by the CAP Board, and which Mr. McCain had operating responsibility for:

I. General: The procedure established by this instruction is to assure that all employees will be given due process in contesting adverse personnel actions such as firing... An appeal is filed directly with the Headstart Policy Council...

II. Procedure: ... Unless

appealed to the CAA Board on procedural due process ground, the decision of the Policy Council is the final step on the program level ..." (Rpp. 274-275).

On November 9, 1983, Mr. Vence received a thorough hearing of the charges against him before the Policy Council Grievance Appeal Committee.

The decision of the Committee was that Mr. Vence should not be fired but should be reinstated with back pay. (Rpp. 6, 147, 270, 373). On December 7, 1983, after another thorough hearing, the full Policy Council upheld the Committee's decision and also voted that Mr. Vence should be reinstated with back pay (Rpp. 6, 147, 270, 373). Petitioner Denise Young was one of

the Policy Council members voting to reinstate Mr. Vence. Mr. Vence did not appeal the Policy Council decision to the CAP Board. However, on December 8, 1983, Mr. Gernert refused to reinstate Mr. Vence on the grounds that the Policy Council's decision represented "gross irresponsibility and disregard of the agency's personnel Policies and Procedures." He then ordered Mr. Vence to appear before the CAP Board, even though Mr. Vence had not appealed the Policy Council's decision (Rpp. 6, 271,171(27), 251, 259, 271, 373). One-third (1/3) of the CAP Board's members are appointed by the Bolivar County Board of Supervisors, which also designated Bolivar CAP to administer

Headstart and which pays 1/3 of Bolivar CAP's office rent (Rpp. 4,371,390).

It took the CAP Board two (2) meetings to achieve a quorum to consider Mr. Vence's termination. There was no quorum at the first meeting and the only reason there was a quorum at the second meeting on January 3, 1984 is because the Chairman, Kirk Povall, begged another member to stay rather than attending a basketball game and another to stay rather than attend a City Council meeting. After speedily considering the matter, the CAP Board voted to terminate Mr. Vence (Rpp. 6,148,167(3), 255, 271, 373, 434-435).

At some point after this meeting, Mr. Gernert spoke with John Jordan, the HHS regional official, in Atlanta, Georgia who oversees Bolivar County Headstart and who must decide whether or not Bolivar CAP is complying with the Federal regulations governing Headstart programs. Mr. Gernert testified at his deposition and subsequently stated in his Answer to Plaintiff's Requests for Admissions that he explained to Mr. Jordan the CAP Board's approval of the decision to terminate Mr. Vence and the Policy Council's disapproval of it. Mr. Gernert then asked Mr. Jordan what would be the proper procedural way to do this. Mr. Gernert states that Mr. Jordan advised him to go ahead and

terminate Mr. Vence, and give him pay up to that point, and let Mr. Vence appeal his termination to HHS (Rpp. 257-258, 390-391, 420, 482, 271-272, 148). Mr. Jordan has denied this (Rpp. 276-324). Mr. Gernert stated in his deposition that he decided to follow Mr. Jordan's advice to disobey the regulation rather than obeying the regulation because "this would be quicker" (Rp.482) After Mr. Vence's termination, the CAP Board then refused to meet with the Policy Council to try and reach an agreement (Rp. 167(4)).

Mr. Vence then appealed his termination to HHS (Rpp. 148, 271). Mr. Jordan ordered Bolivar CAP to reinstate Mr. Vence or funding

would be terminated (Rpp. 171(11) - 171(12), 250). When not surprisingly, Bolivar CAP refused, (Rpp. 167(10), 256 Mr. Jordan ordered that a show cause hearing be held on the matter in Atlanta on April 17, 1984 (Rpp. 171(21), 251).

Although Mr. Jordan and the Hearing Officer both referred to it as an "Informal Show Cause Hearing", the regulation allowing such at 45 CFR §§ 1303.37 was not complied with because the written consent of Bolivar CAP to an "Informal Show Cause Hearing" required by the Regulation does not appear in the Hearing record and, in fact, was never given (Rpp. 171(21), 251, 167(15), 257). Therefore, the regulations which

govern show cause hearings should have been complied with and they were not. First, although Mr. Vence requested that he be allowed to participate in the Hearing, he was not allowed to and was not given a statement of the reasons why not contrary to 45 CFR 1303.35(f) (Rpp. 171(18), 251, 171(20)). Second, no record was made of the Hearing, contrary to 45 CFR §§ 1303.35 and, in fact, the tape recording of the Hearing was erased. (Rp. 253). Third, none of the documents submitted by Bolivar CAP was submitted to Mr. Vence or his attorneys, and in fact, documents which Mr. Vence had never been given were submitted to HHS. (Hearing Officer's Opinion p. 11).

The only record Mr. Vence or his attorney ever received of the Show Cause Hearing was the Hearing Officer's Notes which were produced by HHS on March 21, 1986, in obedience to the District Court's Order entered on March 19, 1986 granting Mr. Vence and Miss Young's Motion to Compel said Hearing Notes (Rpp. 4110413). The Notes do not indicate that termination of funding was ever considered as an Option. The end of the Notes states:

"Saddler (n.b. the HHS Official at the Hearing):

'We are sympathetic'

1) Demotion, suspension

2) My time frame." (Rpp. 438-440)

The Hearing Officer found that Mr. Vence had been terminated

without Policy Council approval, and he also notes that Bolivar CAP's rationale for doing so is that they are held accountable by the Government for the proper administration of grant funds. He then recommended the matter be remanded so that the CAP Board and Policy Council could meet to resolve their difference (Rpp. 171(22)-171(33), 251). On May 17, 1984, Mr. Jordan adopted the Hearing Officer's decision and ordered that the Policy Council and CAP Board meet to resolve their differences (Rpp. 171(34), 171(35), 251).

During this time, Mr. McCain, through the Headstart fiscal Officer, Adolph Hillard, hired seven (7) members of the Policy Council,

including the Chairperson, Jo Ann Anderson, to work on the Summer Feeding Program held at the Headstart facilities during the summer (Rpp. 8, 375-376). On May 31, 1984, Mrs. Anderson called a special meeting of the Policy Council. The notice of the meeting did not state the Police would entertain a motion to rescind its previous disapproval of Mr. Vence's termination (Rpp. 8-9, 376). Also seven (7) of the members present had never heard Mr. Vence present his side of the story (Rp. 376). In spite of that, Mrs. Anderson refused to allow Mr. Vence to speak (Rp. 149, 272). She then entertained a Motion to rescind the Policy Council's former decision.

It passed by a vote of 16 to 8 with one abstention - (Rpp. 9, 376). The Policy Council at that time numbered approximately 45 voting members. Therefore this vote was contrary to Robert's Rules of Order which state that if a week's notice is not given of a Motion to Rescind then a two-thirds majority of the entire body is needed to rescind the decision.

On June 19, 1984, the Policy Council met again. Again Mr. Vence was not allowed to make a presentation and again the notice of the meeting did not state that a Motion to Rescind would be considered. Immediately after that meeting the Policy Council met with the CAP Board which merely approved the Policy Council's decision to rescind

its former decision (Rpp. 9, 267(1)-167(2), 255, 377).

Mr. Vence then appealed the Policy Council's decision to the CAP Board, then to HHS, both of which ruled against him. Having exhausted his administrative remedies, on January 22, 1985, he began this action in the United States District Court for the Northern District of Mississippi (Rpp. 1-18). In addition to Mr. Vence and Miss Young, Beverly Perkins and Reverend Charles Williams, members of the Policy Council who voted in favor of his reinstatement, were also Plaintiffs in the Mandamus cause of action. However, Reverend Williams was later allowed to drop as a Plaintiff by the Court and Mr.

Perkins declined to join in the appeal to the Fifth Circuit. Therefore, only Mr. Vence and Miss Young remain as Petitioners.

After issue was joined, Petitioners conducted extensive discovery including the depositions of Billy Joe McCain, Jo Ann Anderson, Richard Gernert and Adolph Hilliard by non-stenographic means (Rpp. 59-60, 61, 63-64). The Defendants also deposed Mr. Vence by traditional means (Rpp. 57-58). On September 26, 1985 the Non-Federal Defendants served their Motion for Summary Judgement. The ground for the Motion germane to this Petition was that Bolivar CAP was not a state or federal instrumentality subject to the

EDITOR'S NOTE

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constraints of the First, Fifth, or Fourteenth Amendments (Rpp. 65-67).

On October 15, 1985, Petitioners filed their opposition to the Motion for Summary Judgement under FRCP 56(f) which Opposition stated that while a Community Action Agency would be subject to suit under the Fifth Amendment and 42 USC ss 1983 if the jurisdictional prerequisites were met, that Petitioners, although having diligently pursued discovery, were presently unable to present by Affidavit essential facts to justify their opposition to the Motion for Summary Judgement (Rpp. 68-70). In support of their Opposition, Petitioners attached the affidavits of Aaron Vence,

Pamela Childs, Bill Wilson and their attorney, Nancy Pace Kossman to establish the technical problems that Petitioners had been having transcribing the taped deposition of Billy Joe McCain. Attached to Mrs. Kossman's Affidavit was all the discovery conducted by Petitioners up to that point in the case (Rpp. 147-171(49)). After the Summary Judgement Motion and Opposition thereto were filed, Petitioners continued to seek discovery from the non-federal defendants pending the District Court's ruling on the matter. However, on December 17, 1985, Petitioners filed their Motion to extend the discovery deadline, Motion deadline and continue the pretrial conference. The basis

for this Motion germane to this discussion was that Petitioners had been unable to conduct further discovery from the non-federal defendants because of the pending Motion for Summary Judgement and Petitioners' FRCP 56(f) Opposition thereto (Rpp. 240-242). On December 18, 1985, the Court's Order was entered extending the Motions and Discovery deadlines to February 15, 1986, but refusing to continue the Pretrial Conference on the grounds that pendency of a Motion for Summary Judgement was no justification for postponing the Pretrial Conference or failing to proceed with discovery (Rpp. 242-244). Faced with this Order, Petitioners then served further discovery on

the non-federal defendants.

On February 1 (sic), 1986, the federal defendants filed their Motion to Dismiss on the grounds that Bolivar CAP was not a federal instrumentality, which Motion was supported by an Affidavit from John Jordan (Rpp. 276-324).

Shortly before the end of the discovery period, Nancy Kossman then Attorney for Petitioners called Wayne Drinkwater, Attorney for the Non-federal Defendants to set up a time to depose the members of the CAP Board to find out (1) Who they were appointed by, (2) whether they were present at the hearing on his termination and (3) how they voted on Mr. Vence's termination. Mr. Drinkwater agreed to provide the

requested information voluntarily if his clients were not deposed (Rpp. 473, 474). However, after the expiration of the discovery period, he refused to so saying the requested information did not relate to his Motion for Summary Judgement.

When the District Court heard oral argument on the Defendants Motions for Summary Judgement and to Dismiss on March 27, 1986, this problem was brought to the attention of the District Court by Mrs. Kossman as further precluding Summary Judgement under FRCP 56(f) (Rpp. Vol. III 36, 38). Also at oral Argument, Petitioners argued that the Motion should be denied under FRCP 56(f) because Richard Gernert

had not yet signed his Deposition, even though the transcript and the tape thereof had been provided to Mr. Drinkwater on February 28, 1986, (Rpp. Vol. III 41-42) and because Attorneys for Plaintiffs should be allowed further discovery into the show cause hearing, the Notes of which were only provided to them on March 21, 1986 pursuant to the Court's Order compelling discovery.

On April 8, 1986, the District Court's Memorandum Opinion was filed granting both Motions of all Defendants and dismissing the case (Rpp. 449-459). Also on April 8, 1986, pursuant to that Opinion, an Order was entered dismissing the case (Rpp. 460). In its Opinion the District Court found that, even if Mr. Jordan did advise

Mr. Gernert to terminate Mr. Vence over Policy Council disapproval, Petitioners did not establish that Mr. Jordan retained power and authority over Bolivar CAP personnel matters or that Mr. Jordan in some way compelled or directed the ensuing course of action taken by Mr. Gernert. The District Court essentially sidestepped Petitioner's claim that Mr. Jordan's conduct of the hearing in violation of the regulations or subsequent remand constituted federal action by finding that HHS had no authority to hear Mr. Vence's substantive claims.

Regarding Mr. Vence's §§ 1983 claim, the District Court held that the two-pronged test of Lugar v.

Edmondson Oil Co., 457U.S. 922 (1982) had not been met, because Mr. Vence could not show that the deprivation of his rights resulted from a state rule, policy or decision. Finally regarding Mr. Vence and Miss Young's claim for Mandamus, the District Court denied it because it found that the remand was in accordance with HHS Regulations and that HHS had no duty to enforce Bolivar Headstart S.O.P. #18. The Court's Opinion did not discuss Petitioners Rule 56(f) Opposition to the Motion for Summary Judgement.

On April 18, 1986, Mr. Vence and Miss Young served their Rule 59(e) Motion to Alter or Amend the Judgement (Rpp. 466-506). It was denied on May 23, 1986 (Rpp. 513).

On April 21, 1986, the Non-federal Defendants filed their Bill of Costs for $810.00 for Aaron Vence's Deposition. The Bill did not specify whether it was only for the original or included copies (Rp. 507). On May 21, 1986, Mr. Vence and Miss Young's Motion to disallow the taxation of the costs was filed (Rpp. 510-512). On June 21, 1986, an order signed by the District Clerk was entered denying the Motion to disallow costs (Rp. 514).

On July 22, 1986, Mr. Vence and Miss Young filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit (Rp. 515). The case was placed on the Summary Calendar and on April

20, 1987, the Fifth Circuit's Opinion affirming the District Court was rendered. In the Principal and Reply Briefs, Mr. Vence had argued that the specific conduct he claimed as violating his rights under the Fifth Amendment was Mr. Gernert's termination of him over the disapproval of the Policy Council. In its opinion, the Fifth Circuit did not deal with this argument, but rather focused in whether Mr. Jordan had influenced, encouraged or compelled Mr. Germert's original decision to terminate Mr. Vence. The Fifth Circuit found no connection between the original decision to terminate Mr. Vence and Mr. Jordan. Also the Fifth Circuit found that Mr. Jordan subsequently holding the

show cause hearing and remanding the case to Bolivar CAP did not constitute federal action for the purpose of encouraging or influencing Mr. Vence's termination. Regarding Mr. Vence and Miss Young's claim for Mandamus, Court of Appeals agreed with the District Court that HHS had no duty to enforce S.O.P. #18. Regarding their claim that Summary Judgement was inappropriate because discovery was incomplete, the Fifth Circuit did not deal with Mr. Vence and Miss Young's argument that Mr. Drinkwater's refusal to produce the information he had promised precluded Summary Judgement under FRCP 56(f) and simply said that enough time had elapsed since the Motion for Summary Judgement for Mr. Vence and Miss Young to have completed discovery. Finally the Fifth Circuit refused to overturn

the taxation of the deposition for reasons that are not entirely clear and held that the burden was on Mr. Vence and Miss Young to show that copies were made of the deposition, a burden that they had not met. With regard to Mr. Vence's 42USC ss 1983 claim, the Fifth Circuit held that Mr. Vence had abandoned it by not fully briefing it. This was in spite of the fact that a good part of the discussion of their Rule 56(f) Opposition was based on their need for the withheld information to establish state action under 42 USC ss 1983.

On July 16, 1987, Mr. Vence and Miss Young served their Application to Extend Time to file Petition for Writ of Certiorari. It was granted by order of this Court dated July

17, 1987 and they were given until August 18, 1987 to file this Petition for Writ of Certiorari.

Jurisdictional Grounds in the District Court

The District Court had jurisdiction of the original action herein under the Fifth Amendment because Bolivar CAP acted as a federal instrumentality in terminating Mr. Vence over the Policy Council's disapproval, and under 28 USC §§ 1331 (a), 1343(3), and (4) and 1361. The amount in controversy exceeded $10,000.00.

Argument

This is a case where this Court should grant a Writ of Certiorari with regard to Mr. Vence's Fifth Amendment claim because the Fifth

Circuit decided the question in a way that is in conflict with this Court's decisions in Blum v. Yavetsky 457 U.S. 991, 73 LEd2d 534, 102 S.Ct. 2777 (1982) and Anderson v. Liberty Lobby, Inc. U.S. 91 LEd2d202, 106S.Ct. 2505 (1986). Regarding Mr. Vence and Miss Young's other claims: that the District Court should have denied the Motion for Summary Judgement under FRCP 56(f), granted them Mandamus because John Jordan breached his duties not to violate the regulations and to enforce Bolivar Headstart S.O.P #18 and should not have taxed the costs of Mr. Vence's deposition against them, this Court should grant Certiorari because these issues present important questions

of federal law which have not been, but should be, settled by this Court.

I.

Last term this Court articulated the appropriate standard for granting or denying a Motion for Summary Judgement in Anderson v. Liberty Lobby, Inc., U.S., 91 LEd2d202, 106 S.Ct. 2505 (1986). This standard is "...summary judgement will not lie if the dispute about a material fact is "genuine". That is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., supra at p. U.S. 91 LED2d202, 106 S.Ct. 2505 (1986). In Public

Utilities Commission v. Pollak 343 U.S. 451, 72 S.Ct. 813(1952), this Court articulated the following test for a finding of Fifth Amendment action: "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself." Public Utilities v. Pollak, supra, at 343 U.S. p. 462 f.n. 8, 72 S. Ct. p.820 f.n.8. More recently, this Court articulated the proper standard for a finding of State action under 42 USC § 1983 in Blum v. Yaretsky, supra at 457 U.S. p. 1004, 73 LEd2d p. 546, 102 S.Ct. p. :" The purpose of this requirement [i.e. nexus] is

to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the Plaintiff complains... a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be in law be deemed to be that of the State." (emphasis added).

It is respectfully submitted that, under current Fifth Circuit Court of Appeals precedent, the foregoing test has been held to be valid in determining whether Federal action is present under the Fifth Amendment. Miller v. Hartwood Apartments, Ltd. 689 F.2d 1294 (5th Cir. 1982).

Mr. Vence's Fifth Amendment claim sets forth facts that could justify reasonable jurors in finding that Mr. Vence was fired by Mr. Gernert over Policy Council disapproval, in violation of the statute and regulations, because Mr. Gernert was told by Mr. Jordan, the federal official charged with upholding the regulation and holding Mr. Gernert accountable for violating it, that this would be the "proper" thing to do. Reasonable jurors could further find that, when Mr. Vence appealed the firing to HHS, Mr. Jordan deliberately manipulated the appeal, all the while violating the applicable regulations and contrary to the statutory directive that there be direct, effective parent participation in program decisions in

in such a way that Mr. Vence had no further chance to contest the end of his career. Further reasonable jurors could find that Bolivar CAP was not penalized in any manner for violating the regulation Mr. Jordan had encouraged them to violate in the first place. It is respectfully submitted that if reasonable jurors found the above facts to be true, that they would find that Mr. Jordan had provided such significant covert encouragement to Mr. Gernert to fire Mr. Vence over Policy Council disapproval (the specific action complained of), that they would have the power to return a verdict for Mr. Vence on his Fifth Amendment claim.

The main problem with both the District Court's and the Fifth Circuit's Opinions herein is that they do not make inferences from these facts most favorable to Mr. Vence but rather resolve them against Mr. Vence. In both Opinions it is stated that Mr. Jordan's threat to terminate Bolivar CAP's finding obliterates any argument Mr. Vence might have that Mr. Jordan encouraged his termination over the Policy Council's disapproval. Dear Reader, please ask yourself, is it not possible for even an employee of the United States Government to announce that he means to do one thing when he means to do quite another? According to the District Court and the Fifth Circuit it <u>is</u> impossible.

I maintain, when put to the reasonable juror, it would be found to be not only possible, but in this case, probable, especially when one considers that the Show Cause Hearing did not comply with the Regulations, that Bolivar CAP's funding was never terminated, and that Mr. Vence ended up as terminated as terminated can be, with Mr. Jordan's thumb firmly on the scales tilting the balance towards Bolivar CAP.

The word "justice" does not appear in U.S. Supreme Court Rule #17, and yet, surely, it must permeate this Court's deliberations on whether or not to hear a case of Writ of Certiorari. Therefore, apart from the foregoing argument that

tnis federal question was decided in conflict with the aforecited decisions of this Court, it can only finally be argued that if the unwarranted and summary disposition of this meritorious case is allowed to stand, then Justice does not appear, and has not been served, in this case.

II.

In seeking Mandamus under 5 USC § 702, Mr. Vence and Miss Young have claimed that Mr. Jordan owed them three (3) duties: (1) to not advise Mr. Gernert to violate the regulations; (2) Enforce the original Policy Council decision under Bolivar Headstart S.O.P. #18 and (3) to hold the Show Cause Hearing in a manner that complied with the applicable regulations.

both the District Court and the Fifth Circuit only dealt with Mr. Jordan's duty to enforce the original Policy Council decision under Bolivar Headstart S.O.P. #18. Both Courts refused to address the other two (2) duties alleged in their opinions.

It is clear that Mr. Jordan had a duty to conduct the Show Cause Hearing in a manner that complied with the regulations. Workman v. Mitchell 502 F.2d 1201 (9th Cir. 1974). Further, Petitioners argue the lower Courts erred in finding no duty to enforce Bolivar Headstart S.O.P #18 because the statute requires direct, effective parent participation in program decisions and the regulations allow a Policy

Council to negotiate for and receive greater authority if all parties agree (which they appear to have done). Therefore, Mr. Jordan had a duty to enforce S.O.P. #18 which required that the original Policy Council decision be enforced, because its adoption was in accordance with the Regulations and fulfilled the statutory directive of direct, effective parent participation in Program decisions. Petitioners maintain that forcing agreement between the Policy Council and CAP Board in this instance sabotaged the statutory directive. However, the third duty cited by Petitioners represents the important question of Federal law which has not been, but should be,

settled by this Court: to wit, does a federal official have an enforceable duty to not advise others to violate federal regulations? It would seem almost self evident that this is so, since any other conclusion would undermine the rule of law which must exist hand in hand with the federal government. It is respectfully submitted that this case provides an excellent opportunity for this Court to make it clear that not only must federal officials obey the law and regulations themselves, they are prohibited from counseling others to violate them. For that reason a Writ of Certiorari should be issued to review this question.

III.

Another important question of federal law that has not been settled by this Court, but can be in this case, is what exactly should be the District Court do when a Motion for Summary Judgement is opposed under FRCP 56(f)? Of course, FRCP(f) sets out the following possible actions. "...The Court may refuse the application for judgement or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is Just." However, in this case, Petitioners were placed in dilemma where, after they filed affidavits stating why they could not present by affidavit facts essential to justify their

their opposition, the Court took none of the above described actions.

At first, trying to avoid a Motion for a Protective Order, Petitioners did not conduct any further discovery against the Non-federal defendants while waiting until the Court had ruled on their FRCP 56(f) Opposition, a ruling which was never made. Then, after the Magistrate refused to re-set the Pretrial Conference on the grounds that pendency of a Motion for Summary Judgement was no justification for failing to proceed with discovery, Petitioners once again began to seek discovery from the non-federal Defendants. At the hearing on the Motion for Summary Judgement, Attorney for Petitioners once again urged the

Court that further discovery was necessary because of Mr. Drinkwater's breaking his promise to provide the requested information about the Board members, Mr. Gernert's failure to sign the transcription of his deposition and HHS only providing the Hearing Officer's Notes compelled by the Court on March 22, 1986, after the discovery period had expired. However, the District Court did not anywhere address Petitioner's Rule 56(f) Opposition in its Opinion granting Summary Judgement to all the Defendants.

Petitioners then raised these contentions again in their Motion under Rule 59(e) to Alter and for Vacate the judgement, claiming that the Court should vacate its

grant of Summary Judgement to allow these problems to be resolved. Again, the District Court simply denied the Motion without discussion. These points were raised yet again in Petitioners' Principal Brief as an Error. The Fifth Circuit dealt with this issue not by analyzing the points raised but by counting how many months elapsed between the filing of the lawsuit and stating: "Appellants therefore had ample time to conduct discovery."

This case gives this Court an opportunity to require lower Courts to make an Order of this type specified in FRCP 56(f) when the non-moving party opposes Summary Judgement on the grounds that discovery is not completed. It is respectfully submitted that, for

the Court to make such a ruling would end the uncertainty experienced by litigants who, as in this case, must oppose Summary Judgement under FRCP 56(f) but are given no guidance by the Court on the matter and must either await the Court's ruling and suffer because they failed to conduct further discovery or conduct further discovery under peril of the moving party filing a Motion for a Protective Order. To leave this question unresolved does nothing to secure the "just, speedy and inexpensive determination of every action." FRCP 1., whereas to resolve it would serve those praiseworth purposes of the Federal Rules of Civil Procedure.

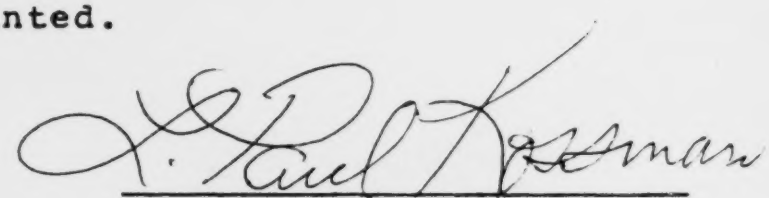
IV.

Finally, Mr. Vence's Deposition costs are reached. This Court has never decided whether the language of 28 USC §§ 1920(2) allowing as costs: "all or any part of the stenographic transcript necessarily obtained for use in the case" requires that the deposition of a party plaintiff even though not used in any substantial sense will always be taxable as costs. Especially where, as here, it was never even made part of the record. It is respectfully submitted that this is not required by the statute and that, in this case, the District Court Clerk abused his discretion in granting these costs and the Fifth Circuit erred in

upholding the Order. While Deposition costs may not be an earthshattering issue, still, the expense of taking stenographic depositions, and the threat of having to pay for them if one loses are a crucial consideration for any person of modest means who must resort to the federal Courts to protect his or her rights. Therefore it is respectfully argued that for the Court to grant a Writ of Certiorari to resolve this issue, and to resolve it in Petitioners' favor would also aid in the "inexpensive" determination of every action.

Conclusion

WHEREFORE, based on the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.



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